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ABSTRACT

A question that now confronts producers, distributors, and consumers of information, as well as the manufacturers of information technology and the government is: what is the nature of copyright protection in the Information Age? Congress has a Constitutional mandate to protect the rights of innovators but has refused to act in the case of videocassette recorders (VCRs), and an analysis of the decision making process in the VCR situation, where progress in informational technology threatens the copyrights of information producers, may help explain Congressional unwillingness to exercise its power. The industries and copyright owners who have felt themselves most directly threatened by the VCR have pursued two primary routes to protect their interests, the Federal Courts and Congress. In both areas they have been opposed by the manufacturers of VCRs and by supporters of the individual's right to videotape at home. The Betamax decision by the United States Supreme Court in 1984 ruled that the sale of videotape recorders (VTRs) by the Sony corporation to the general public does not make the machines' manufacturers and marketers responsible for the potential infringement of Universal City Studios' and fellow respondents' copyrights. This case leads to the need for several policy decisions for the future of VCRs, information technologies in general, and the protection of copyrights: (1) legislation against "Black Boxes" (mechanisms designed for the sole purpose of defeating internal protection against unauthorized duplication); (2) the right of copyright owners to choose to encode any work they want to protect; and (3) the creation, by Congress, of a definition of fair use which considers the implications of new information technologies. (One hundred and twenty-three notes are included, and 25 references are appended.) (MS)

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Copyrights in the Information Age: Betamax and the Congress.

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Scanning popular and academic media it seems clear that America is entering the Information Age. Considering the number of recently developed technologies delivering information to American homes confirms this observation. A question that now confronts the information producer, the information distributor, the information consumer, the manufacturer of information technology and the government is what belongs to whom and who should pay for it, or what is the nature of copyright protection in the Information Age?

200 years ago the framers of the United States Constitution granted the Congress the power...

> ...To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries [1]

It could be argued that the end of this mandate is to promote progress and copyrights only serve as the means to that end.

Congress has refused to exercise this power in the 1980s as the Videocassette Recorder (VCR) represents progress in informational technology and yet threatens the copyrights of information producers. This inaction is a disturbing development as advances in information technology promise a continued rise in the quality and quantity of its delivery, and will pose further threats to creative copyrights. An analysis of the decision making process in the VCR situation may explain the Congressional unwillingness to exercise its power. It will show where producers, distributors, consumers and manufacturers have turned to resolve their differences. Analysis will also establish the need for Congressional action on this issue as America stands on the threshold of the Information Age.

Frank Magid & Associates in the employ of Hubbard Broadcasting reported in 1984 that eighteen percent of American households contained VCRs. Magid's analysis in August of 1986 indicated the number of VCR homes leaped to fifty-one percent. Figures from the August 1987 survey of 1,000 homes calculates the

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[1] U.S. CONST. art. 1, sec. 8.

number of American homes equipped with VCRs at close to sixty percent, while nearly half of the homes without VCRs will probably be equipped with one within the next year. More conservative figures compiled by Arbitron and Nielsen calculate VCR penetration near fifty percent of American households.[2]

By any measure, at least half of the homes in this country possess the technology and implied freedom to videotape full length television shows and motion pictures. The right of individuals to tape copyrighted programs was declared non-existent by the Federal Court of Appeals, Ninth Circuit in October of 1981.[3] The court ruled that home videorecording was an infringement of audiovisual creators' copyrights.[4] The decision effectively declared one of the primary uses of VCRs illegal. Within two days of the judgement, the wheels of Congress went into motion. Both the House and Senate looked for some compromise to protect the interests of American home videotapers, as well as, the interests of American copyright owners. The Circuit Court ruling was reversed in 1984 by the United States Supreme Court in what is known as the Betamax case.[5] On the other side of the street in Washington, D.C., the Congress has yet to formulate any legislation that will satisfy copyright holders, VCR owners and VCR manufacturers.

The industries and copyright owners who have felt most directly threatened by the VCR have pursued two primary routes to protect their interests, the Federal Courts and the Congress. In both arenas they have been opposed by the manufacturers of VCRs and the supporters of the individual's right to videotape at home. Copyright holders and related entertainment industries have found the most success, however, in marketplace approaches to the situation.

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[2]"VCR's:Going Up" Broadcasting 19 Oct. 1987: 7.

[3]Universal City Studios v. Sony Corporation of America, 659 F.2d 963 (9th Cir. 1981).

[4]Id at 976

[5]Sony Corporation of America v. Universal City Studios, 464 U.S. 417 (1984).

The Betamax Decision

The Betamax decision by the United States Supreme Court in 1984 ruled that the sale of videotape recorders (VTRs)[6] by the Sony Corporation to the general public does not make the machines' manufacturers and marketers responsible for the potential infringement of Universal City Studios', and fellow respondents', copyrights.[7] Universal and some cohorts in the production industry, including Disney Productions, had attempted to fundamentally outlaw VTRs because of the machine's potential impact on their ability to generate revenue from their copyrighted audiovisual creations.

The process that led to this Supreme Court decision began in the Federal Court for the Central District of California in 1979.[8] At that time Sony was the primary manufacturer and marketer of VTRs to the general public. Their home units were bulky, difficult to use, and expensive by today's standards. Nonetheless, the Hollywood production community perceived them as a threat and looked to the District Court for relief in the form of an injunction against the manufacture and marketing of VTRs and videotapes. The District Court refused to grant the injunction.[9] The decision was based on a number of key factors. First, Universal admitted that no harm had come to them from the manufacture and marketing of VTR's.[10] Second, the program producers could not predict at what date or level of

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[6]VTR is synonymous with VCR. Before the machines used cassette tapes, and were widely available to consumers, they were professionally known as videotape recorders, VTRs. Since the judicial process that created the Betamax decision began in 1979, before the widespread consumer acceptance of VCRs, VTR is used as the acronym for the machines at all three levels of judicial review.

[7]Sony, *supra* note 5.

[8]Universal City Studios v. Sony Corporation of America, 480 F. Supp. 429 (C.D. Cal. 1979).

[9]Id.

[10]Id. at 439.

sales their predicted harm would occur.[11] Third, the District Court concluded that VTR's are capable of noninfringing uses, and that the public should not be denied this new technology by an injunction.[12] Finally, the decision stated that it was not the court's duty to "undertake the role of a government commission or legislative body exploring and evaluating all the uses and consequences of the videotape recorder."[13]

A primary legal concern throughout the Betamax case was whether or not the videotaping of programs off of broadcast television constituted a fair use of that copyrighted material under section 107 of the 1976 Copyright Act. The law reads as follows:

> Notwithstanding the provisions of section 106[14], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered include--
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[15]

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[11] Id. at 465.

[12] Id. at 464.

[13] Id. at 442.

[14] Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly. Copyright Act of 1976 sec 106, 17 U.S.C. sec 106 (1982).

[15] Copyright Act of 1976 sec. 107, 17 U.S.C. sec. 107 (1982).

Fair use had long been a judicial doctrine when it was codified in 1976. It is "one of the most important and well-established limitations on the exclusive right of copyright owners..."[16] The four basic premises for determination of fair use in the statute were not, however, intended as strict definitions of the doctrine by its authors.

> The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.[17]

The Universal group appealed the District judgement on the basis of a perceived misapplication of fair use and in 1981 the Ninth Circuit Court reversed the decision and instructed the District Court to formulate some form of relief.[18] The Circuit Court found that home taping was not protected as a fair use of copyrighted materials because the alleged infringers were reproducing copyrighted works for their intrinsic purpose.[19] In other words, the VTR owners were taping television shows to watch them at another time in their entirety and for their entertainment value. The court also cited that there is "no Congressional intent [in the fair use section of the Copyright Act of 1976[20]] to create a blanket home use exception to copyright protection."[21] The Circuit Court's ruling declared that home video recording was a copyright infringement and that Sony, along with the distributors, retailers and advertisers for their VTR's, were liable for this infringing use.[22]

Sony, of course, wanted to retain its rights to operate freely in the ever expanding home entertainment market, and appealed the decision to the United

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[16] 17 U.S.C. sec. 107 note at 27 (1982) (Historical and Revision Notes).
[17] Id at 28.
[18] Universal City, *supra* note 3.
[19] Id. at 970.
[20] Copyright Act, *supra* note 14.
[21] Universal City, *supra* note 3, at 977.
[22] Id. at 976.

States Supreme Court. When the High Court finally passed judgment in 1984 time and technology had changed the nature of the issues. The video tape recorder had become less expensive and more accessible to the consumer. The audiovisual production community was realizing that VTRs could be the foundation of a lucrative home market for a wide range of program products, including movies previously released in theaters. And, Congress had failed in two attempts to create legislation regarding the VTR and copyrights.

From the outset of the court proceedings, Universal's case was founded in copyright interests related to specific broadcasting situations, and directed at Sony, one manufacturer and marketer of machines capable of infringing their rights in those situations. Their apparent intent was to implicate the entire VTR industry in the erosion of appropriate copyright compensation in the video entertainment media. The District Court said the case was about off-air recording for home use, and not about the recording of any type of cable program, the swapping of tapes, the duplication of tapes or the taping of off-air programs for use outside of the home.[23] The Supreme Court agreed and made it clear that this case was not a class action suit of copyright owners, nor a class action suit against VTR owners.[24] The Court underscored the fact that Universal sought no relief against Betamax owners. The Universal group only wanted money damages, an equitable accounting of profits, and an injunction against the manufacture and marketing of Betamax VTRs by Sony.[25] Therefore, the Court said, Universal was saddled with the burden of proof to directly implicate Sony in a specific case for the infringement of copyright law.[26] It was noted that the sale of copying equipment, machines which are capable of copyright infringing activities, does not equal contributory infringement if the product is used for a great deal of legitimate, unobjectionable activities, or

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[23]Universal City Studios, *supra* note 8, at 442.
[24]Sony, *supra* note 5, at 434.
[25]Id. at 420.
[26]Id. at 434.

even if the product is only capable of substantial noninfringing uses.[27] Thus, the question the Supreme Court wanted answered before they made a decision was whether or not the Betamax was capable of noninfringing uses.[28]

Sony argued that their product was capable of many noninfringing uses including the videotaping of events around hearth and home. The company maintained that the primary use of VTR's in relation to the off-air taping of broadcast programs was for time shifting[29]. The Supreme Court pointed out that if Sony was found guilty of contributory infringement it "would inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time shifting."[30] It was argued that the person who uses a VTR to time shift a program for later viewing would otherwise miss the program completely. Therefore, the Court ruled that time shifting is a legitimate fair use. Thus, Sony was not liable for the infringing use of their product because the Betamax is, at least, capable of noninfringing uses.[31]

The Supreme Court made clear its overriding intentions in this decision through two statements.

> **Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology [32]**

and

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[27]Id. at 418.
[28]Id. at 442.

[29]Time shifting is the recording of a program for later viewing. An example of this would be taping "Late Night with David Letterman" while you sleep, and then watching the show the next morning, or evening. Another example is taping one program while you watch another, that way you are able to see both of your favorite shows even though they are both on at eight o'clock on Thursday night. It is implied that videotapes used for time shifting are used repeatedly and not kept to form a library of video programs.

[30]Sony, *supra* note 5, at 446.
[31]Id. at 418.
[32]Id. at 431.

> ...it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgement of the Court of Appeals must be reversed.[33]

Clearly, the Court refused to do what it saw as the job of the Congress, to legislate policy related to a new technology. The Court accomplished this goal by narrowly defining the issues in place and time. Betamax was considered only on its merits as a single case, and not on the implications it could hold for the entire home entertainment industry.

Universal and their fellow petitioners were at least partially to blame for their failure to win significant concessions. The group defined the parameters at the outset of the process and the Supreme Court chose to stay well within them in their final decision. The apparent desire to eliminate the VTR threat while the industry was budding impaired the Universal group's long range vision, and ultimately meant their defeat.

The Supreme Court also seemed to be sending a message to interest groups and Congress through the Betamax decision. The possibility that the High Court could radically define a policy toward VTRs was very real, as attested to by the fact that VTR sales did not take off until after Betamax was complete.[34] Rather the Court let it be known that before anyone instigates a proceeding related to the impact of a new technology on their rights, they better be sure to pursue legislation and establish solid ground on which the Court might base judgment. Perhaps, the Universal group would have been more successful if they had pursued the policy making potential of Capitol Hill before they took Sony to court.

Congressional Hearings and Subcommittees

Stan Parris, a Representative from Virginia, set into motion the Congressional merry-go-round for the development of legislation in October of 1981. Parris' bill, H.R. 4794, was the first attempt to incorporate the rights of home videotapers into

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[33] Id. at 456.
[34] "VCRs: Going Up," 7.

copyright law.[35] It appeared immediately in the wake of the Circuit Court's reversal of the District decision in the Betamax case. A parallel bill was launched in the Senate the next day.[36] The two never emerged from consideration on the committee or subcommittee level. They set the standard for subsequent attempts to codify a policy concerning VCRs and the taping of copyrighted materials for personal, non-commercial, use.

These two bills, and a number of their progeny, were granted subcommittee and committee hearings in both the House and Senate. These often star-studded events, including celebrities Clint Eastwood and Charlton Heston, introduced the public to the major players in the VCR policy game.

On the side of maximum control, and economic benefit for copyright holders, stands the Hollywood production community. This group was represented by the Coalition to Preserve the American Copyright (CPAC) and the Motion Picture Association of America (MPAA), both in the person of the MPAA president, Jack Valenti. The U.S. Copyright Office also expressed its support for legislation which would compensate copyright owners for the taping of their materials on VCRs.

Standing in direct opposition to these groups, on the side of consumer rights and the individual freedom to videotape, as well as representing some VCR manufacturers, was the Home Recording Rights Coalition (HRRC) and its legal counsel, former Federal Communications Commission Chairman, Charles D. Ferris. Also standing in opposition to legislative control of VCRs was the American electronics industry through the Consumer Electronics Group of the Electronic Industries Association.

Sitting in the middle of this conflict of interest was the Congress. The Reagan Administration also fell somewhere in between, assuming a low key role and middle ground position. In general the Executive branch advocated the need for

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[35]H.R. 4794, 97th Cong., 2d Sess. (1981).

[36]S. 1758, 97th Cong., 2d Sess. (1981).

some Congressional consideration while proposing that the marketplace might resolve any conflicts that exist.

It is interesting that broadcast and cable television were not represented in the Congressional hearings. It seems these two had a great deal at stake in the proliferation and use of VCRs in American homes.

The first round of the Capitol Hill-VCR policy game got underway in November of 1981. The Senate Judiciary Committee was considering Senate Bill #1758, a reaction to protect consumer rights in the face of the Ninth Circuit's Betamax declaration.[37] Originally, the bill's sole intent was to reverse that ruling, however, subsequent amendments added compensation for copyright holders through the establishment of licensing fees for VCRs and videotapes, which would lead to royalty payments for copyright owners.[38] The size of these fees and payments was to be determined at some future point in time by the Copyright Royalty Tribunal," *Provided, however,* That no system of compensation will impose direct liability on the individual who uses recording devices and media in the home for private purposes."[39] In its final form the bill was an attempt to protect the rights of all parties involved in the VCR/copyright issue.

The CPAC found Senate Bill #1758 very much to their liking because it provided them with compensation for the use of their works. Movie Celebrity Charlton Heston came before the committee and explained that people buy VCRs for entertainment. He said the machine manufacturers are the only ones benefitting from this use and that they should not benefit at the expense of the entertainment's copyright owners.[40] Jack Valenti claimed this new technology unrestrained was hampering "the creative community in this country in its efforts

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[37] *Hearings on S. 1758 Before the Senate Committee on the Judiciary,* 97th Cong. 1st Sess. 1 (1981) [hereinafter *S. 1758*].

[38] Id. at 19.
[39] Id. at 337.
[40] Id. at 528.

to bring enjoyable entertainment to American homes."[41] He concluded that an unregulated VCR industry was not in the public interest. To underscore their arguments the CPAC enlisted the services of Laurence H. Tribe of the Harvard Law School. In a study of copyright law and the VCRs impact Mr. Tribe concluded,

> It is perhaps obvious that motion picture and television producers will speak less often if the reward for their efforts is greatly reduced. VTR owners may then enjoy an expanded right to look, but there may be less to look at--and such viewer's rights will come at the expense of those members of the viewing public who either cannot afford VTR's or who choose not to violate copyright laws.[42]

The CPAC also provided research from Media Statistics Incorporated which showed that most VCR owners library home-taped programs and had more cassettes than would be required if they were only time shifting.[43] They went on to observe that most VCR owners were "up-scale" in regards to income, education and occupation, which presumably meant they can afford to pay the little more that would be charged for VCRs and videotapes to cover a licensing fee. The researchers concluded that legislation without some form of copyright compensation would adversely effect "copyright owners, the public at large, broadcasters, and those who work to create films."[44]

The testimony in favor of establishing a licensing fee followed closely the arguments that had been presented up to this point in the Betamax case. Statements again reflected unsubstantiated speculation about the financial loss copyright holders would sustain from the home use of VCRs. They connected these losses with a subsequent drop in creative audiovisual products available to the average American. David Ladd, the Register of Copyrights in the Library of

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[41] Id. at 464.

[42] Id. at 126.

[43] Time shifting v. Librarying was one of the main issues in the Betamax case at all levels of judicial consideration. Time shifting is explained in note 28. Librarying is the practice of taping off of the air, or cable, programs that will be kept intact for an unknown number of subsequent viewings. The taper essentially creates a library of video programs for discretionary use. It is also feared that these libraried tapes will be used to trade with other VCR owners.

[44] *S.1758* at 472-473.

Congress, said that the Copyright Office supported the CPAC contentions. They saw the licensing concept as a way to maintain the rights of home users and to appropriately charge those who benefit from the use of copyrighted materials, i.e. the VCR and videotape manufacturers.[45]

Arguments against the licensing fee maintained the view that the primary use for VCRs was time shifting, which does not violate the letter, or spirit, of the 1976 Copyright Act. Jack Wayman of the Electronic Industries Association argued that a tariff on videotapes and VCRs would have a chilling effect on technological creativity in the electronics industry. He held that copyright laws shouldn't be used for greedy purposes.[46] The HRRC employed the skills of economist Nina W. Cornell in the defense of its position. She emphasized that the market already compensated program creators through a number of licensing procedures. She also called for a recognition that these "license fees" were by definition taxes, and should be referred to as such.[47] Sony's worldwide advertising representative, McCann-Erickson, sent its Chairman of the Board to the hearing, Eugene Kummel. He supported the view that copyright owners were already compensated and pointed out that VCRs actually increased the audience for a production, thus the viewer should have the right to it without being taxed.[48] And, Charles Ferris maintained the HRRC's basic contention that home recording was a fair use and already protected under the 1976 Copyright Act.[49]

Testimony in a House subcommittee hearing on parallel legislative proposals was primarily a reiteration of what the Senate committee heard. However, in this proceeding important statements were made by the Attorney General's Office, the Department of Commerce and the National Endowment for the Arts, which reflected some Administrative views on the VCR issue.

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[45]Id. at 375-376.
[46]Id. at 47.
[47]Id. at 598-603.
[48]Id. at 634.
[49]Id. at 568-569.

Jonathan Rose , Assistant Attorney General in the Office of Legal Policy, established the overriding Executive view of this entire process. First, the detection of copyright infringers in the privacy of their homes "would be impractical, if not Orwellian."[50] Second, the "proposed regulatory solution would, of course, impose some costs, [taxes], on members of the public who are wholly innocent of any infringing activities," because it is nearly impossible to single out infringers from noninfringers and charge them a fee.[51] Finally, the Congress needed to give serious and expedited study to the unsettled issues of copyright loss.[52] Essentially, it appears that the Reagan Administration had no desire to become a significant player in the VCR/copyright issue. This understanding is supported by Bernard J. Wunder, Jr.,Assistant Secretary for Communication and Information, United States Department of Commerce.

> **There is little evidence now available concerning whether the potential problems video recording may cause the programming business will prove self-levelling, or whether the marketplace will develop workable solutions without the need to resort to special copyright legislation.[53]**

A lone voice calling out for some sort of compensation for copyright holder's from within the Executive branch came from Francis S. M. Hodsoll, Chairman of the National Endowment for the Arts. He pointed out that creative enterprises are private property and should be protected. As a proponent of artistic endeavor, he expressed the fear that inadequate compensation for producers, and therefore, reduced marketplace incentive, would result in lowest common denominator programming.[54]

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[50] *Home Recording of Copyrighted Works, 1982: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, H.R. 5705, Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. of the Judiciary,* 97th Cong., 2d Sess. 375 (1982) (hereinafter *Works*).

[51] Id. at 379-380.
[52] Id. at 383.
[53] Id. at 389.
[54] Id. at 395.

It's rather surprising that Mr. Reagan's Hollywood friend, Jack Valenti, was unable to garner Presidential support. In this case, it seems that the political power of the President's general policy of deregulation, and his opposition of new taxes, were more important than his loyalty to the Movie industry.

The Senate Judiciary's Subcommittee on Patents, Copyrights and Trademarks conducted a hearing on two bills related to VCRs and copyrights in 1983.[55] Senate Bill #31, the "Home Recording Act of 1983," would have codified the individual's right to make one video recording of a production for private use and not be liable for the infringement of a copyright.[56] It would have also provided for a compulsory licensing fee for VCRs and videotapes, whether they were imported, or manufactured in the United States.[57] A portion of those fees were to be distributed as royalty payments to copyright owners.[58] Senate Bill #175 on the other hand, declared that recordings were not an infringement if they were made for private use and not used in a commercial nature.[59]

The Betamax case was still in the judicial system and David Ladd, speaking once again for the Copyright Office, urged the Congress to make some sort of legislative decision on VCRs regardless of its outcome.[60] He stated that the legislative history of the 1976 Copyright Act made it clear that fair use was not an excuse for recording audiovisual materials because of user convenience. He believed that "substantial librarying is occurring. . . by any calculation," and that this was threatening the revenues for copyright owners in other markets, such as theatrical and television exhibition.[61] Finally, Ladd pointed out that he was a

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[55] *Hearing on S. 31 and S. 175 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) [hereinafter *S. 31*].

[56] Id. at 5.
[57] Id. at 6.
[58] Id. at 9.
[59] Id. at 48-49.
[60] Id. at 31.
[61] Id. at 55.

servant of the people and not the industries involved in the issue, and as such, he saw a royalty fee serving the public interest.[62]

Jack Valenti agreed with Ladd that Congress needed to do something regardless of the Betamax outcome.[63] The CPAC arguments were generally the same as above. Valenti said that Pay cable, Pay television, Network television and syndicated television all pay licensing fees and asked why VCRs should be treated differently.[64] He said VCR and tape manufacturers were benefitting from home taping without any of the obligation that accompanies this subsequent use of copyrighted materials.[65] The general tenor of his argument was that VCRs were destroying the deficit financed motion picture industry and eliminating creative incentive by decreasing the demand for audiovisual product. Therefore, copyright owners were entitled to some form of royalty payment from VCR and videotape manufacturers to recover financial losses in the marketplace.

Charles Ferris and the HRRC stood firm in their convictions about the individual's right to tape for personal use, and continued to stress that time shifting was the primary function of VCRs.[66] Arguing against the overbreadth of a law which taxes manufacturers of tapes, as well as VCRs, Ferris said legislation of this nature would be full of legal pitfalls. He also emphasized that the movie industry was not in need of relief, and that copyright owners were already compensated, because VCRs provided a new market for their product[67] Finally, Ferris pointed to the fact that worldwide film production rose from 1982 to 1983 contradicting the assertion that VCRs were destroying the motion picture industry.[68]

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[62]Id. at 70.
[63]Id. at 280.
[64]Id. at 290.
[65]Id. at 298.
[66]Id. at 351.
[67]Id. at 344.
[68]Id. at 397.

In spite of the pleas from the Copyright office and the CPAC the Congress did nothing. Both of these bills disappeared without a trace. It appears that Congress wanted the Supreme Court to take care of this situation.

Stan Parris tried to get the issue back on the Congressional agenda and introduced a Noncommercial Recording Bill in the House early in 1985. This legislative effort was sent to the Judiciary Committee and never heard from again.[69]

Then, in September of 1986, Congress briefly flirted with the VCR issue again. The Senate Judiciary Committee held an informational hearing on the VCR situation, no legislation was pending or proposed. Chairman Strom Thurmond said they just wanted to find out if there is a copyright problem related to VCRs, if it is of a magnitude that requires Congress to legislate, and if there are any alternate legislative approaches that should be pursued.[70] It can, therefore, be assumed that from the Congressional perspective there is no copyright problem with VCRs. If there is, it is not significant enough for either house to deal with it, or consider alternative legislative approaches, because nothing further has been proposed on Capitol Hill.

In spite of the lack of resultant legislation the hearing was significant because it marked a turning point in the concerns of copyright owners. VCRs had gained recognition as a boon to the movie industry and not the harbingers of demise they were projected to be in previous hearings and the Betamax case. Hollywood had grown attached to this very profitable secondary market. The concern at this time was the protection of prerecorded tapes from unauthorized back to back duplication.[71] This concern was not exclusive to owners of movie

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[69]H.R. 384, 99th Cong., 2d Sess. (1985).

[70] *Home Video Recording, 1986: Hearing Before the Senate Comm. of the Judiciary*, 99th Cong., 2d Sess. 1 (1986) [hereinafter *Home Video*].

[71]Back to back duplication is the direct connection of one VCR to another to produce a close to identical copy of the original tape.

copyrights. The producers of training videos had found that in business and industry their copyrighted works were being unlawfully duplicated to avoid the purchase price of another copy, or the price of a licensing fee to legally copy productions.[72] Another fear among both groups of video producers was the possibility that consumer electronics companies would make unauthorized duplication simple by marketing dual-port VCRs.[73]

The movie industry had already instituted marketplace measures to keep their prerecorded tapes from being copied. They started encoding prerecorded tapes in the spring of 1985.[74] This copyguard is used to render the result of simple VCR to VCR duplication worthless.[75] But, a number of companies developed and openly market "Black Boxes" that neutralize the encoding and allow back to back taping. Touting their "Video Copyguard Killer" as the "first and only device capable of removing all copyguard interference," DT Electronics International Corp. of New York offered a "money back satisfaction guarantee." They also made the disclaimer, "This device is sold with the express intent that it will only be used to improve home viewing. The unauthorized duplication of copyrighted material is illegal."[76] The MPAA and the training video industry would like to see these devices outlawed.[77]

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[72] *Home Video* at 34.

[73] Id. at 33. Dual-port VCRs allow the consumer to duplicate tapes using only one machine. One port is for playing the original tape. The other port is for recording a copy of it.

[74] "'Cotton Club' Cassettes Encoded Against Piracy," Los Angeles Times 24 Apr. 1985: Sec. VI, 5.

[75] Technically, a copyguarded or encoded prerecorded tape carries additional digital, or analog, information that does not disturb the viewing of that tape, but when unauthorized duplication is attempted the information causes the video in the copy to glitch and roll. Basically, it makes the tape look like lousy broadcast reception from a small antenna on the top of a television set of signals from a station forty miles away: the proper color comes and goes, and the frame won't line up or hold still.

[76] *Home Video* at 32.

[77] Id. at 70.

The MPAA and the training video industry also told the Senate Judiciary committee they would like to see Congress pass a law requiring that all VCRs manufactured for the American market carry an anti-copying chip. This piece of hardware would work in harmony with an encoded tape to make duplication nearly impossible. Jack Valenti said,

> the only truly effective protection against unauthorized copying must be a "bi-lateral" technology. This means not only must the prerecorded videocassette or disc be "encoded," but the VCR itself must also be equipped in such a way to foil the act of unauthorized copying.[78]

The support of VCR legislation was summarized in the statement that the consideration of back to back recording as private and non-commercial, and therefore, protected, is a "wholly unsupportable myth."[79]

Charles Ferris and the HRRC stood in opposition to the legislative mandate of anti-copying chips in VCRs. Ferris contended that in Betamax the Supreme Court ruled that home recording is not illegal.[80] He feared that the installation of these chips would allow producers of audiovisual materials in all media to foil the copying of their programs and eliminate the home taping market.[81] He pointed out that the developer of the encoding for prerecorded tapes said that his company could continue to improve the system and defeat "Black Boxes." Ferris maintained that an internally fixed piece of hardware would not have this potential for improvement and would achieve rapid obsolescence.[82] Thus, the interests of copyright owners were most effectively served copyguarding tapes and not altering VCRs. Ferris then attacked the MPAA's legislative proposals as being based on greed. He contended that they want the hardware legislated so they will no longer have to pay the fee for the encoding of tapes, which he said could cost them between $70 and $280 million a year by 1995.[83]

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[78] Id. at 15.
[79] Id. at 22.
[80] Id. at 74.
[81] Id. at 75.
[82] Id. at 95.
[83] Id. at 96.

This hearing saw the video production industry present it most cogent arguments for the legislative control of VCRs. Even so, the Congress did not pursue the matter further. Perhaps the Reagan Administration held sway, and the marketplace attitude expressed in 1981 prevailed in the second session of the 99th Congress in 1986.

Marketplace Mandates

The two most aggressive marketplace policy makers in the VCR issue have been the always mentioned motion picture industry, and the yet to be heard from cable industry. While Hollywood has chosen to confront the VCR industry toe-to-toe in the pursuit of its interests, cable has fully adopted the "if you can't beat 'em, join 'em" philosophy.

Unquestionably, the Motion Picture Industry suffered defeat in the Betamax decision and the Congressional refusal to act. But, their bruised egos must have taken solace in the fact that the VCR provides them with a secondary market of tremendous proportions. If they had been successful in their attempts to discourage the proliferation of VCRs, it is highly unlikely Paramount Pictures would have been able to gross more than $75 million on the sale of "Top Gun" videocassettes.[84] However, they fear now, that the machine that created the market will limit their potential profit through unauthorized duplication.

Their first step for protection was to encode the prerecorded cassettes to minimize the quality of unauthorized copies.[85] Their second step has been an integrated approach between Washington and Tokyo. While they continue to push for legislation on Capitol Hill, the MPAA has been making repeated junkets to Japan

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[84] "Home Video vs. Cable in Vegas," Broadcasting 25 May 1987: 41.

[85] "Cotton Club" was the first encoded videocassette on the market. The Los Angeles Times reported on 24 Apr. 1985 in Sec. VI, Page 5, that this process "should eliminate casual, illegal duplicating by customers." An interesting note is that this tape cost $79.95 at the retail counter. The very successful "Top Gun" videocassette retailed in 1987 for $26.95 rather than the now standard price of $29.95.

to convince that country's VCR manufacturers to submit to the interests of American copyright holders.

The MPAA would like the Japanese to include anti-copying chips in every VCR they export to the United States. James Bouras, MPAA Vice President for Home Video, told the Washington Post in June of 1986 that the MPAA would have a chip agreement there within the year, or never.[86] Apparently, the movie industry has met with disappointment again. The MPAA has been successful, however, in keeping dual-port VCRs out of the United States. Sharp Electronics, a Japanese firm, planned in 1984 to introduce these machines to the U.S. market. The MPAA threatened to take them to court and the Sharp dual-port deck has yet to be seen here. Sharp's Marketing Manger for Consumer Video, John C. Falcone, says, "there were legal ramifications we were concerned about."[87] Consequently, the MPAA pressure has resulted in a voluntary restraint agreement by the Japanese Electronic Industries Association. That country's VCR manufacturers collectively agreed not to ship dual-port VCRs to any country where "the question of copyright would be a major hurdle."[88]

Samsung of Korea, which is not bound by the Japanese agreement, announced plans to introduce the "Translator" model VCR to the American market in June of 1986. They say this dual-port machine is primarily designed to transfer VHS tapes to Sony 8mm video.[89] Whatever the machine's designed purpose, the MPAA has threatened to sue if it comes ashore in America.[90] Thus far, the machine is not available here.

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[86] "New VCR May Provoke Movie Showdown," Washington Post 5 June 1986: E2.

[87] "Movie Showdown" E2.

[88] "Movie Showdown" E2.

[89] "Movie Showdown" E1. VHS and Sony 8mm are incompatible videotape formats. The older VHS tapes cannot be played in Sony 8mm systems and vice-versa. The newer Sony format produces a higher quality video picture than VHS and has a wide range of video products associated with it, including underwater cameras.

[90] "Movie Showdown" E1.

The one industry with the most to lose as American homes become VCR equipped is cable television. One of cable's primary marketing tools is the freedom it provides through variety in its programming. Included in the mix are pay services like HBO, Showtime, and The Movie Channel which bring movies, uncut and without commercials, into the home. Cable was one of the first media to connect American living rooms with Hollywood. That unique place in the market has now been partially superseded as the owner of a VCR can go to the local video rental store and pick out a favorite movie to watch at her convenience. VCR homes now have uncut movies, without commercials, on demand. The VCR owner is not subject to the scheduling choices of programmers at cable movie services, has access to films sooner than cable subscribers, and has freedom to choose any film from any producer.[91]

Additionally, VCRs have achieved the penetration level in American homes of cable television in less than ten years.[92] They have accumulated nearly sixty-seven percent of their total penetration since 1984, the year of the Betamax decision[93]. VCRs are also generating revenue at a phenomenal pace and quite possibly at cable's expense. In 1984 pay services on cable generated $3.4 billion while home video produced only $1.5 billion. Three years later, pay services were generating $4.3 billion and home video was bringing in $6 billion.[94]

The cable industry did not take part in Betamax or the Congressional hearings. After Betamax, however, all of cable television moved toward the integration of this new technology into their marketing schemes.

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[91]Hollywood attempts to generate the maximum revenue from every market in which its product is distributed. Therefore, unless a cable service is able to reach a special agreement with a film's producer, a movie will be available on videocassette well before it appears on a movie channel. Also, each movie service on cable is limited by the contracts it has with major studios. Some films are given exclusive runs on one service and may never be available on another.

[92]"Video vs. Cable" 41.
[93]"VCRs:Going Up" 7.
[94]"Video vs. Cable " 41.

The Cable Television Administration and Marketing Society started the push for VCR integration into cable marketing in 1984. They encouraged cable operators to become a part of the "VCR revolution."[95] The country's third largest operator of multiple cable systems, Group W, incorporated VCRs into their advertising and promotions in early 1985.[96] They provided information about VCRs and the ways they accent, and are accented by, cable television, and they offered to help subscribers hook up their VCRs. Within the year several other multiple system operators (MSOs) were pursuing VCR education programs, including the nation's second largest, A.T.C. Jones Intercable, among the top ten MSOs, began selling VCRs at a discounted price to its subscribers. They allow customers to pay for the VCR in installments with their monthly cable bill.[97]

Cable programming services also joined in the fight to integrate VCRs and cable television. HBO in January of 1986 was the first pay programming service to get on the bandwagon. The service started by providing cable systems with information for distribution to subscribers on the compatibility of cable and VCRs.[98] The most aggressive market approach to the VCR dilemma for cable comes from The Movie Channel (TMC). The pay movie service instituted "VCR Theater" in May of 1986, a concept that explicitly encourages time shifting by the service's subscribers, and implicitly provides them an opportunity to create a library of their favorite movies. At three a.m. everyday, TMC presents a different movie for subscribers to tape while they sleep. Then they can view that particular feature at their convenience. Promotions for each morning's coming attraction are run throughout the day on TMC, and schedules are made available in monthly billing statements. Future plans for the "VCR Theater" include marathons, double features,

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[95]"Cable's New Approach to VCR," Advertising Age 27 Aug. 1984: 18.

[96]Susan Spillman, "Group W Makes Peace with VCRs," Advertising Age 25 Feb. 1985: 36.

[97]Judann Dagnoli, "HBO Ads Latch on to Rising VCR Sales," Advertising Age 6 Jan. 1986: 31.

[98]Dagnoli 31.

star salute series and theme weeks. TMC had hinted at this idea a year earlier, but the movie industry applied pressure and blocked it.[99] Finally, TMC, who is fighting for survival in a highly competitive market, decided, "damn the studios, full speed ahead!"[100] It is interesting that since TMC began marketing "VCR Theater" Hollywood has made no attempt to stop them.[101]

Cable organizations are also sponsoring symposia in which cable operators are encouraged to look for more ways they can incorporate VCRs into their marketing. At the same time cable executives are looking for ways to overcome the video store and use the VCR to their advantage, i.e. a wider variety of program options and a more rapid turnover from theater to home through Pay Per View.[102] The cable industry is also exploring methods for cooperation with video rental stores to improve the market position of both enterprises.[103]

Observations on the VCR/Copyright Issue

There is little doubt that the audiovisual production industry erred, both in the order of their appeals to government for relief and the content of those appeals. As far back as 1979 the District Court's Betamax judgement told the Universal group that the court was not the place to pursue copyright legislation related to new technologies. The group continued in this direction in the Circuit Court and claimed a victory until the Supreme Court affirmed the District

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[99]Rich Zahradnik, "Tape My Movie...Please!" Media & Marketing Decisions May 1986: 34.

[100]Zahradnik 34.

[101]Vicki Stern, Showtime/TMC Public Relations, Telephone Interview, 24 November 1987.

[102]Pay Per View (PPV) is when movies, and other entertainment events, are made available through the cable system on a single charge for a single event basis. In this scheme movies would be run on a PPV basis at the same time, or before, their release on videocassette. Right now PPV is having some technological/logistical difficulties with ordering and billing for the individual programs. Obviously, the possibility of home taping before the cassette release will be a consideration as cable companies negotiate for the rights to present movies on a PPV basis.

[103]"Video vs. Cable" 41.

contention in 1984. Surprisingly, it was the defenders of consumer rights that started the legislative process. The first bills proposed in the House and Senate attempted to codify the right of home taping. Hollywood then flexed its political muscles in an attempt to get royalties from the sale of VCRs and videotapes. Finally, the entertainment production industry did not pursue marketplace policy processes until the Congress repeatedly refused to act and they lost in the Supreme Court.

The clearest example of the movie industry failure is the recent success of the American music industry to generate action in the legislation of restrictions on the digital audio tape recorder (DAT).[104] Although the HRRC appears to have the upper hand in this case[105] there is a distinct possibility that the music industry learned from Hollywood's VCR mistakes and is therefore finding more success on Capitol Hill. One bill, requiring DATs to carry anti-copying chips for at least a year, has already been approved in a House Energy and Commerce subcommittee.[106] The Senate Commerce Consumer Subcommittee is considering a bill that would require the chips to be carried for three years. The Reagan Administration has gotten involved with DATs, while it shied away from VCRs, and is sponsoring a bill that would require the chips permanently rather than temporarily.[107] In this situation legislation has been the first approach employed, and it appears to be generating a great deal of interest and success for the music industry.

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[104]DATs are audio player/recorders that deliver the same sound quality as Compact Discs. Unlike the Compact Disc, DATs use cassette tapes which can be used for recording purposes as well as playback. The DAT cassettes are a different size than the 1/4 inch audio cassettes now on the market. Similar to Compact Discs, DATs employ digital technology which means a DAT duplicate is virtually the same as the original, whether that original is another DAT cassette or a Compact Disc.

[105]"Digital Tape Recorders Spark Lobbying War," Congressional Quarterly 13 June 1987: 1235.

[106]"House Panel OKs Bill to Deter DAT Imports," Congressional Quarterly 8 Aug. 1987: 1821.

[107]"Lobbying War" 1235.

The content of movie industry arguments related to VCRs generally lack merit. They began the process in apparent fear of the new technology. The Universal group in Betamax demanded that Sony be restrained in their manufacturing and marketing of a machine that encouraged people to infringe creative copyrights. Jack Valenti and the CPAC repeatedly emphasized the destructive effects of the VCR on incentive in the creative process. Perhaps this is a classic Hollywood love story as the movie industry has now made the VCR an important part of their family. This machine has the ability to increase the monetary incentive to create through the development of the secondary market evidenced by the already mentioned sale of "Top Gun" videocassettes.

Truly, the marriage of these two industries has been consummated and now the movie industry is fighting to protect the offspring from back to back taping. However, that may not be as big a problem as the 1986 Senate hearing and MPAA marketplace activities indicate. William Nix, director of the Worldwide Anti-Piracy Program of the MPAA, spoke before an international symposium on Video Piracy[108] and said,"...the most significant drain on U.S. film revenues is the theft of signal[109], not video theft."[110] Hollywood is also sufficiently endowed with technological knowledge to prevent the unauthorized duplication of their product. They possess the technology to continue to improve the copyguarding of prerecorded tapes. "Black Boxes" are definitely a threat, but John Ryan, the inventor of the industry's most widely accepted encoding system, Macrovision, said

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[108]Video Piracy is illegally obtaining audio/visual materials through covert means, i.e. unauthorized duplication of tapes and unauthorized reception of copyrighted satellite signals.

[109]Signal Theft is the unauthorized reception of copyrighted materials distributed by satellite. These signals can be picked up on a backyard satellite dish-antenna, but the widespread encoding of satellite signals requires covert action on the part of the video-pirate to receive them clearly

[110]William Nix,"Buccaneers Prey on the Movie Industry," Security Management Nov. 1986: 34.

a new method of encoding is being developed, and it will require thousands of dollars worth of mechanisms to defeat it.[111]

Generally, the HRRC and the VCR industry have been the winners in this policy making process despite the fact that from Betamax to the Congressional hearings they have assumed a defensive posture. They ultimately prevailed in the Supreme Court, but did not achieve any clear cut victories in the legislative arena. The lack of legislative action, however, is a form of success because the VCR industry is selling its products without the imposition of any copyright related taxes. Also, given the lack of specific legal definitions, the consumer is able to exercise a great deal of freedom in what is, and is not, taped in the privacy of the home. It would be a mistake, however, to presume Betamax provides a protective legal blanket for individuals to videotape whatever comes into their home.

The Betamax decision essentially protects the rights of individuals to record programs from broadcast television for viewing at a later time, time shifting. Without some sort of codification, the right of the home viewer to tape anything for purposes other than the time shifting of broadcast programs is questionable. There is a certain amount of strength in the argument that home taping in general is infringing. A literal reading of the fair use section of the Copyright Act makes this clear.[112] Justice Blackmun in his dissent to the final Betamax decision says there has been "no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use."[113] Inherently, Betamax is not an exception to this observation. Time shifting was declared noninfringing on the basis that it increases a broadcaster's potential audience,[114] not on the practice's benefit to the individual taper.

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111 *Home Video* at 70.
112 Copyright Act, *supra* note 14.
113 Sony, *supra* note 5, at 479.
114 Id. at 446.

Recently the VCR/copyright issue has been silent as the players focus on other issues, but there are too many questions unanswered for it to disappear. VCR technology will continue to expand as had audio technology. Sometime in the near future digital video recorders, or something like them, are going to be introduced. These recorders may be able to produce copies that are indistinguishable from the original.[115] This is a prospect that will make the movie industry at least as upset as it has made the music industry in their attempts to control DATs. Home tapers will not only have the technology for the unauthorized duplication of copyrighted audiovisual works, they may have the potential to create copies equal in quality to the original prerecorded tapes.

It is also hard to believe that dual-port VCRs and their descendants will remain off the market without some form of legislation prohibiting their sale, or a sophistication in tape encoding that will render them useless. Under the precedent established in the Betamax decision the "Translator" model made by Samsung of Korea could be protected. Its ability to transfer tapes from the old VHS format to the higher quality Sony 8mm format is potentially a noninfringing use because the transfer could involve non-copyrighted materials, e.g. video recordings of family outings. Betamax established that a machine's mere capability of noninfringing use means the manufacturer and marketer are not responsible for the potential infringing uses by a machine owner.[116] Therefore, the MPAA will be hard pressed for legal grounds if they try to defeat the manufacturers and marketers of this type of VCR in a United States court. It is doubtful the MPAA could take such a case to court at all. There seems to be a restriction on cases related to technology and copyright in the Betamax decision. The Supreme Court makes it rather clear they will not consider VCR/copyright cases, or other conflicts involving new

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[115]"Lobbying War" 1235.
[116]Sony, *supra* note 5, at 418.

information technologies, until the Congress legislates something on which the Court can base a judgement.[117]

Legislative Suggestions & Future Imperatives

Reason dictates several policy decisions for the future of VCRs, information technologies in general, and the protection of copyrights. First, there needs to be some sort of legislation against "Black Boxes." These are mechanisms designed for the sole purpose of defeating internal protection against unauthorized duplication. In spite of manufacturers' disclaimers it is difficult to believe they are purchased for any reason beyond the blatant infringement of a prerecorded tape's copyright through the neutralization of its encoded copyguard.[118] Devices of this type are also used for the decoding of cable channels, satellite frequencies and computer program disks. This ban would make the infringement of a copyright a premeditated act requiring a conscious consideration of the risks and benefits that can be derived from breaking the law.

Coupled with this legislation copyright owners can choose to encode any work they want to protect. Examining the claims of encoder companies it seems that any creative video endeavor, or informational technology, can be protected by this method. Apparently, any product that comes into a home, by way of videotape, cable, broadcast television, satellite or computer disk, can be protected.[119] This negates the necessity for the installation of anti-copying hardware and dilutes the infringing potential of machines designed primarily for duplication, e.g. dual-port VCRs. This universal copyguarding also means the copyright owner ,and/or information distributor, can decide whether a particular work will be available for duplication by the general public. Market forces would

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[117]Id. at 431.

[118]For an example of how Betamax was applied in a this type of case see RCA Records v. All-Fast Systems, 594 F. Supp. 335 at 339 (S.D.N.Y. 1984).

[119]"Cotton Club' Cassettes " Sec. VI, 5.

probably keep encoding out of most broadcasting, cablecasting and other television entertainment sources because of the potential for increased audiences through time shifting, and the negative public image that would result from widespread encoding of programs found on a particular service.

Finally, Congress needs to create a definition of fair use which considers the implications of new information technologies. Even though the determinants of fair use found in the 1976 Copyright Act are not meant to be narrowly applied[120] it seems they have been in both the Ninth Circuit Betamax decision[121] and Justice Blackmun's dissent to the Supreme Court's ruling on the case.[122] Congress is the only arm of government that is constitutionally imbued with the power to promote progress and act on the copyright issue.[123] There is considerable doubt the Supreme Court will hear related cases without some legislative definitions enacted as law. The Reagan Administration wants Congress to take the political risks, though its view may have changed with direct involvement in the DAT situation. And, the bulk of market solutions appear to be temporary. They are dependent on the current Judicial interpretation of fair use, and the Congressional definition of the copyright limiting doctrine.

VCRs are but a small part in the first wave of technological innovations for the Information Age. If Congress is unable to determine ways to promote progress while protecting the rights of the information producer and the information consumer at this stage, what does the future hold? Will producers continue to threaten the manufacturers, or will they follow the lead of distributors and choose to cooperate? If they don't choose to cooperate won't the consumer be the real loser? And what about progress? Will all this conflict leave America behind in the development of information technology?

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[120]Copyright Act, *supra* note 14.
[121]Universal City, *supra* note 3, at 977.
[122]Sony, *supra* note 5, at 479.
[123]U.S. CONST. art. 1, sec. 8.

There is a need, along with a Constitutional and Judicial behest, for Congress to act on the VCR issue. They need to establish precedents for future copyright decisions as the implications of the new technologies will only become more complex. The framers of the Constitution had the foresight to give Congress the power to promote progress and to provide protection for the rights of innovators. The House and Senate need to face the challenge of that power and weigh all of the factors to protect the rights of producers, distributors, consumers and manufacturers while promoting progress in this time of rapidly advancing information technology.

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